

FACTUAL HISTORY

On December 2, 2006 appellant, then a 47-year-old part-time flexible carrier, filed a traumatic injury claim alleging that he developed a right knee condition walking in the performance of duty on that date. He reported that he underwent knee surgery in 1983 while in the army. Appellant indicated that his route changed in 2006 and required more walking. He stated that he was able to work with knee pain in October and November 2006, but on December 2, 2006, he sustained a sharp pain in his knee which became unbearable. Dr. William S. Ogden, a Board-certified orthopedic surgeon, opined that appellant required a total knee replacement on December 2, 2006. On May 4, 2007 he stated that appellant's employment duties contributed to his knee condition. The Office accepted appellant's claim for temporary aggravation of localized primary osteoarthritis of the right knee on May 22, 2007. It authorized compensation benefits for December 2, 2006 through May 4, 2007 in the amount of \$2,854.27.

The Department of Veterans Affairs (VA) authorized right knee surgery and Dr. Jonathan Snyder, a Board-certified orthopedic surgeon, performed a right total knee arthroplasty on August 29, 2007. The Office approved this surgery on October 18, 2007.

In a letter dated December 20, 2007, the Office requested information from the VA regarding appellant's VA disability benefits.

Appellant completed a Form EN1032 on January 17, 2008 and indicated that his VA benefits had not increased. He returned to work on January 22, 2008 and the Office ended his compensation benefits effective that date. Appellant informed it that his VA benefits increased to 100 percent in October 2007 after his surgery and would remain at 100 percent for 12 months.

By letter dated March 21, 2008, the VA informed the Office that appellant was entitled to compensation at the rate of \$2,655.00 a month from December 1, 2007.

Appellant completed a Form EN1032 on January 17, 2008 and stated that his VA benefits increased temporarily on August 30, 2007 through September 2008 due to the total right knee replacement. In a letter dated September 19, 2007, the VA informed him of his compensation rate indicating that on September 1, 2007 he received \$2,933.00, on September 19, 2007 \$2,711.00, on August 11, 2008 \$2,610.00 and on October 1, 2008 \$556.00. The VA indicated that appellant's 100 percent disability was due to the right total knee arthroplasty and that he had additional compensation for spondylolisthesis L5-S1 at 20 percent.

In a letter dated October 20, 2008, appellant stated that he required additional knee surgery on September 9, 2008 from the VA. On September 9, 2008 Dr. Richard Mather, a Board-certified orthopedic surgeon, performed a revision of right total knee arthroplasty due to dislocating patella and incompetent medial collateral ligament. The Office approved this surgery on November 7, 2008 and the resulting recurrence of disability. By letter dated November 10, 2008, it informed appellant that he must elect between VA and Office benefits due to his accepted knee injury and resulting surgery.

In a letter dated November 10, 2008, the Office informed appellant that he was not entitled to dual benefits for an injury and that an increase in a veteran's service-connected disability brought about by an injury sustained while a federal employee was considered a dual payment. It requested that he make an election and noted that he had received an overpayment of compensation. The Office also requested appellant's most recent rating from the VA due to his additional surgery on September 9, 2008. Appellant elected to receive VA benefits in a letter dated January 8, 2009. By letter dated January 20, 2009, the Office informed the VA that compensation payments in the amount of \$14,539.11 had been made to appellant and requested deductions from future benefits until this amount was repaid. The record contains documentations supporting the Office's calculation that appellant received compensation benefits totaling \$14,539.11 from September 1, 2007 through January 19, 2009 while receiving dual benefits from the VA.

On July 20, 2009 the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$14,539.11 for the period September 1, 2007 through January 19, 2009 because he received dual benefits from the Office and the VA during this period. It found that he was not at fault in the creation of the overpayment and requested financial information in support of a request for waiver. Appellant requested a precoupment hearing on August 23, 2009. He completed an overpayment recovery questionnaire on August 23, 2009 indicating his monthly income included social security benefits in the amount of \$1,674.00, VA benefits of \$2,940.00, spouse's earnings of \$700.00 and his 24-year-old daughter's earnings of \$850.00 as well as OPM retirement of \$1,728.20 for a household income of \$7,892.20. Appellant stated that his rent was \$995.00, his food expenses \$875.00, clothing expenses of \$100.00 and utilities of \$275.00 as well as other expenses of \$825.00. He indicated that he had car payments of \$542.75 and \$483.50 as well as credit card debt with monthly payments totaling \$249.00 and his 24-year-old-daughter's monthly payments of \$960.00 for total monthly expenses of \$5,305.25. Appellant indicated that he had savings accounts totaling \$2,171.12. He also submitted his tax return for 2008, student loan information, car tax receipt and other bills.

Appellant testified at the oral hearing on December 10, 2009 and stated that he no longer received 100 percent disability from the VA receiving instead receiving \$890.00 a month. He stated that his VA benefits were based on 30 percent for his knee and additional percentages for other accepted conditions. Appellant also stated that his wife's income was variable between \$400.00 to \$1,400.00 a month. He also testified that his savings accounts had been reduced to \$832.00.

By decision dated April 13, 2010, an Office hearing representative affirmed the Office's July 29, 2009 preliminary decision finding that appellant had received dual Veterans Administration and Office benefits for the period September 1, 2007 through January 19, 2009 in the amount of \$14,539.11. The Office hearing representative found that appellant was without fault in the creation of the overpayment and that the overpayment was not subject to waiver as he established monthly income of \$7,892.20 exceeded his monthly expenses of \$5,305.25 by \$2,586.95 a month. The Office hearing representative found that based on the financial information submitted appellant could afford to repay the overpayment, that he had not provided additional financial documentation to support the change in income and that he could make payments of \$400.00 a month to allow the Office to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Act provides certain limitations on the right to receive compensation.² Section 8102 of the Act³ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Generally, the Act beneficiary may receive compensation concurrently with other benefits administered by the VA,⁵ but there is a limitation imposed under the Act when the VA benefits are payable for the same injury or the same death for which the Office is paying compensation.⁶ The prohibition against dual payment of the Act and VA benefits applies to those cases where the disability or death of an employee has resulted from an injury sustained in federal civilian employment and the VA has held that the same disability or death was service connected.⁷ The prohibition also extends to an increase in a VA service-connected disability award, where the increase is brought about by an injury sustained while in federal civilian employment.⁸ An example of this latter scenario is where an employee is receiving benefits from the VA for 50 percent disability due to a service-connected condition, and has a civilian employment injury which causes a disabling aggravation of the preexisting condition. The Office determines that the employee has a total loss of wage-earning capacity due to the accepted condition, and subsequent to the employment injury, VA increases its award to 100 percent as a result of the aggravation by the civilian employment injury.⁹ In this example an election of benefits is required. The election will be between the amount of entitlement under the Act plus the amount received from the VA for 50 percent disability prior to the civilian employment injury, on the one hand, and the total amount of entitlement from the VA for 100 percent disability, on the other hand.¹⁰ No election is required between the VA benefit the employee was receiving at the time of the civilian employment injury and the Act benefits to which the employee is entitled for the civilian employment injury because these benefits are not payable for the same injury.¹¹ When the VA increased its benefits an election was required because the increased benefits were payable for the same employment injury which formed the basis of entitlement to the Act benefits.¹²

² See *id.* at § 8116; *Kelvin L. Davis*, 56 ECAB 404, 407-09 (2005).

³ *Id.* at §§ 8101-8193.

⁴ *Id.* at § 8102.

⁵ *Id.* at § 8116(a)(3).

⁶ *Id.*

⁷ *J.C.*, Docket No. 09-2096 (issued May 6, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(1) (December 1997).

⁸ *Id.* at Chapter 2.1000.8b(2).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

ANALYSIS -- ISSUE 1

Appellant elected to receive VA benefits in lieu of wage-loss compensation under the Act effective September 1, 2007, the date his VA benefits increased to 100 percent. Any wage-loss compensation he received from that date forward constitutes an overpayment of compensation. The record shows that the Office continued to pay appellant until January 19, 2008, thus he received an overpayment.

With respect to the amount of the overpayment, the Office found that appellant had received \$14,539.11 in compensation benefits for the period September 1, 2007 through January 19, 2009. Appellant has not disputed the amount. Therefore the Board finds that he has received an overpayment in the amount of \$14,539.11 as he received dual benefits from the VA and the Office for the period in question.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, when an overpayment of compensation occurs “because of an error of fact of law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.¹³ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations¹⁴ provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed the resource base of \$4,800.00 for an individual.¹⁵ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of

¹³ 5 U.S.C. § 8129(a).

¹⁴ 20 C.F.R. § 10.436.

¹⁵ *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹⁶

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹⁷ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.¹⁸

ANALYSIS -- ISSUE 2

The Office found that appellant was without fault in the creation of the overpayment, but the hearing representative denied waiver of the overpayment. Appellant has submitted financial information and testimony listing his monthly income as between \$8,592.00¹⁹ and \$5,542.00²⁰ a month. At the oral hearing, he testified that his wife's monthly earnings varied between \$400.00 to \$1,400.00 a month. Appellant also testified that his VA benefits had been reduced from \$2,940.00 to \$890.00 a month. He listed his monthly expenses as \$5,305.25. The Board finds that based on the record appellant's documented earnings exceed his expenses by \$3,286.75 more than enough so that recovery of an overpayment will not defeat the purpose of the Act and cause hardship to him. While he has asserted that his VA benefits were reduced by \$2,050.00 a month which would be consistent with evidence of the VA's prior reduction of his benefits as described in the record, even with this reduction his income exceeds his expenses by \$1,236.75 a month. The Board is unable to give credence to appellant's testimony regarding his wife's income given the wide range and lack of supportive evidence.

There is no evidence that recovery of an overpayment would be considered to be against equity and good conscience as appellant has not submitted any evidence or testimony that in reliance on such payments or on notice that such payments would be made, he gave up a valuable right or changed his position for the worse. With respect to the recovery of the overpayment, the Board notes its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.²¹

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.437(b).

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

¹⁹ Appellant did not calculate his monthly income on the overpayment recovery questionnaire, but initially listed his wife's monthly income as \$700.00 a month rather than \$700.00 every two weeks.

²⁰ This monthly income number is based on the reduction of VA benefits to \$890.00 and his wife's income to \$400.00 a month in agreement with appellant's testimony.

²¹ *D.R.*, 59 ECAB 148 (2007).

As argued by counsel, the Board has considered that appellant's VA benefits have been reduced and determined that this reduction was not sufficient to result in financial hardship for him and that waiver is not appropriate.

CONCLUSION

The Board finds that appellant has received an overpayment in the amount of \$14,539.11 in which he was not at fault, and that the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board